91-657

No. (1)

Supreme Court, U.S.
FILED
OCT 18 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

VINCENZO RIVERSO, PEITITONER

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the Court should exercise its supervisory power to reverse summarily the judgment of the court of appeals affirming petitioner's conviction for participating in a narcotics conspiracy because the judgment is based on evidentiary conclusions that are not supported by the record.

PARTIES TO THE PROCEEDING

Four other individuals were parties to the proceeding in the court of appeals: Vincenzo Miceli, Michael Modica (defendants-appellants-cross-appellees), and Michael Bernardo and Alfredo Spavento (defendants-appellants).

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No.

VINCENZO RIVERSO, PETITIONER

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Vincenzo Riverso petitions for a writ of certiorari to review the judgment of the United States of Appeals for the Second Circuit in this case.

OPINION BELOW

The court of appeals' summary order (App. A, 1a-23a) is not published.

JURISDICTION

The order of the court of appeals was entered on April 30, 1991. The order of the court of appeals denying rehearing (App. B, 24a) was entered on July 16, 1991. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Background

After a six-month jury trial, petitioner Vincenzo Riverso and four of his co-defendants were convicted of conspiring to violate the narcotics laws (21 U.S.C. 841 et seq.). The four other defendants were also charged with and convicted of a total of eight substantive narcotics offenses, each involving a single sale to an undercover agent. Riverso was sentenced to 12 and one-half years in prison and four years of supervised release. The district judge (the Honorable John E. Sprizzo) continued Riverso's bail pending appeal pursuant to 18 U.S.C. 3143(b), finding that the appeal would involve the substantial issues of whether the government proved the "unique" conspiracy the indictment alleged and, if so, whether Riverso participated in it. Hearing 10/31/89, 42-44. On August 1, 1991, the court

of appeals granted Riverso's motion to stay its mandate pending the filing of this petition.

The indictment charged that the 28 named defendants conspired (together with some 45 named coconspirators) to violate the narcotics laws by importing kilogram quantities of heroin, by exporting cocaine in quantities in excess of 5 kilograms, and by distributing and possessing with intent to distribute those quantities of heroin and cocaine. The indictment also charged ten of the 28 defendants (not including Riverso) with a total of 24 substantive violations of the narcotics laws based on 20 sales that were allegedly made pursuant to the conspiracy.

Riverso went to trial with 16 of his co-defendants (the eleven other defendants were either severed, pleaded guilty or were fugitives). During the government's case three defendants pleaded guilty. At the end of the government's case the district court granted

the motions of seven defendants for judgments of acquittal, primarily because the evidence showed only their involvement in a single heroin transaction which, the court ruled, was insufficient to support a finding that each agreed to participate in the unique multi-drug conspiracy the indictment alleged.

The jury found two of the remaining seven defendants (both charged only with conspiracy) not guilty, and found Riverso guilty on the conspiracy count and the four other defendants guilty both on the conspiracy count and on a total of eight substantive counts.

The evidence

1. The government's case consisted mainly of evidence gathered during three separate undercover investigations, evidence that the court of appeals held established the existence of the single conspiracy the indictment alleged. The court of appeals described the conspiracy as "a network of narcotics suppli-

ers and distributors" that defendant Spavento managed with Riverso's help. App. A, 4a-5a.

The evidence showed that from January 1987 through March 1988 eight defendants made a total of 20 narcotics sales to government agents: 18 sales of heroin in varying amounts totalling slightly more than 4 kilograms for which the agents paid $850,000; and two sales of cocaine of 0.5 kilogram each for which the agents paid a total of $30,000. For 13 of the 20 sales there was no evidence identifying the source. (See App. C, 25a, a chronological list of the 20 sales based on the indictment and the government's brief in the court of appeals ("gov't br."), showing the seller, the amount of narcotics, the price and the source or broker for each sale.)

Spavento was charged with and convicted for his participation in three of the 20 sales. There was no evidence that Spavento was involved in any way in the other 17 sales.

The unique feature of the conspiracy was

the alleged "Italian heroin-for-cocaine swap" (see App. A, 3a, 5a). According to the indictment, one way the defendants carried out the unlawful agreement was by transporting cocaine to Italy, exchanging it there for heroin and then transporting the heroin to this country for distribution. The government claimed that pursuant to the swap scheme the conspirators obtained heroin in Italy for from $15,000 to $110,000 (in cash or cocaine) per kilogram and then sold the heroin here for $200,000 per kilogram (gov't br. 13 & n.*). At trial and on appeal the government represented that "[t]he heroin/cocaine swap scheme" actually operated, that it was highly profitable, that it was the source of a substantial part of the heroin the conspirators sold, and that a number of defendants were directly involved in operating the scheme (gov't br. 13, 18, 41, 46-47).

According to the record no defendant imported or sold heroin that was the product

of such a swap scheme, and no defendant exported cocaine for the purpose of exchanging it for heroin to be sold domestically.

The record shows that two defendants (Bernardo and Fiumara) proposed the "swap scheme" three times and that it was never accepted. They urged defendant Sabino to give them cocaine in return for their promise to give him heroin, but Sabino refused and made them promise to pay him in cash. And, on separate occasions, Bernardo and Fiumara urged two undercover agents to give them cocaine which, they said, they would exchange in Italy for heroin the agents could sell here and earn an enormous profit. Bernardo told one agent that if he gave Bernardo $30,000 worth of cocaine, Bernardo would give him $200,000 worth of heroin, after he made the "swap." Fiumara told the other agent essentially the same story. Neither agent pursued the offer to participate in the swap scheme.

2. The government did not claim that Riverso participated in the three sales in which Spavento was involved, or in any of the other 17 sales, or that Riverso participated in the sale of narcotics at all, either for himself or as Spavento's agent or assistant. It argued that other events showed that Riverso was a member of the conspiracy.

Of particular relevance in light of the court of appeals' decision is the evidence of Riverso's dealings with defendant Mark, a courier who cooperated with and testified for the government. He said that defendant Fiumara gave him a package to smuggle into Italy and told him that it contained cocaine. Mark said he gave the package to Riverso in Rome. Mark also testified that Fiumara did not pay him for his courier services and that Riverso offered to pay him with counterfeit money and gave him small sums on Fiumara's behalf. There is no evidence and the government did not contend that Riverso was acting

as Spavento's agent when he dealt with Mark, and there is no evidence connecting Spavento to those transactions.

It is also relevant in light of the court of appeals' decision that there is no evidence and the government did not claim that Riverso knew Modica or Miceli or that Riverso participated in their narcotics transactions, which accounted for five of the 20 sales (see App. C. 25a).

The court of appeals' decision

The court of appeals unanimously affirmed the five appellants' convictions. As already mentioned, the court held that the evidence showing the existence of the "Spavento network" was sufficient to prove the unique conspiracy the indictment alleged. The network got the narcotics it sold, the court concluded, from two "essential ... sources of supply": Modica and Miceli and "the Italian heroin-for-cocaine scheme" (App. A, 5a). And

it observed that Riverso was involved in both of those supply "operations" (App. A, 5a).

The court also concluded that "[t]here was ... more than sufficient evidence to connect Riverso to Spavento's activities and thus to the charged conspiracy" (App. A, 16a). To support that conclusion the court said "there was overwhelming evidence" that Riverso participated in two series of transactions "as Spavento's representative": (1) "sales to Agent Caruso;" and (2) "the use of Jerry Mark as a courier to smuggle cocaine into Italy ..." (ibid.).

REASON FOR GRANTING THE PETITION

The Court should exercise its supervisory power to reverse the court of appeals' judgment affirming Riverso's conviction because the judgment rests on conclusions that are not supported by the evidence.

The court's determination that a "Spavento network" existed and that it approximated the conspiracy the indictment alleged

cannot be sustained when there is nothing to show that Spavento was responsible for or aware of 17 of the network's 20 sales. It is, moreover, irrational to conclude that Riverso, who was not shown to have been involved in any of the 20 sales, helped Spavento manage a network.

Similarly, there is no support in the record for the court's conclusions that Modica and Miceli and the Italian heroin-for-cocaine swap scheme were essential sources of supply for the network and that Riverso was involved in both "operations." Modica and Miceli, it is true, together supplied or participated in five of the 20 sales. But it is also true that there is nothing in the record to show that Riverso was involved with Modica or Miceli or their "operation." And there is no evidence that the "swap scheme" ever operated to produce any heroin, the object of the scheme according to the government. It fol-

lows, therefore, that Riverso could not have been involved in its operation.

The evidence the court relied on to support its conclusion that Riverso was a participant in the Spavento network is non-existent. Nothing in the record shows that Riverso sold drugs to agent Caruso or that Riverso acted as Spavento's representative in his dealings with Mark. But the court held that those two series of transactions constituted "overwhelming evidence" that Riverso participated in the unlawful agreement because they "connect[ed] Riverso to Spavento's activities and thus to the charged conspiracy" (App. A, 16a).

We recognize that the Court rarely accepts a case for review simply to correct errors of the lower courts. This case warrants the exercise of the Court's supervisory powers, however, both because it is the only way to avoid an injustice, and because the nature of Riverso's evidentiary claims makes them amenable to summary disposition.

Riverso is not asking the Court to weigh the evidence to determine if it was sufficient to sustain his conviction. Rather, Riverso's claim is that the court of appeals' affirmance of his conviction rests on conclusions that are not supported by any evidence. There is, therefore, no need for the Court to resolve disputed factual issues in order to rule on Riverso's evidentiary claims. The government will have the opportunity in its opposition to demonstrate that the evidence supports the conclusions Riverso challenges. If the government can not summary reversal should follow.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the court of appeals affirming Riverso's conviction should be reversed.

Respectfully submitted.

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October 1991

APPENDIX A

88-cr-217
SPRIZZO

RKW

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 30th day of April , one thousand nine hundred and ninety-one.

Present:
Honorable Ellsworth A. Van Graafeiland,
Honorable Ralph K. Winter,
Honorable John M. Walker, Jr.,
Circuit Judaes.

UNITED STATES OF AMERICA,
Appellee, Cross-Appellant,

v.

EMANUELE ADAMITA, MICHELE BERNARDO, CLAUDIO CALDERONE, SALVATORE CANNAVO, SR., SALVATORE CARUSO, DOMENICO CATALONO, GAETANO DiBENEDETTO, JOHN EMBLETON, GIUSEPPE FICO, RAFAEL FIUMARA, ABDUL AZIZ KAKAR, GIUSEPPE LAROSA, EMANUELE LOGIUDICE, VINCENZO MICELI, MICHELE MODICA, ANGELO PALUMBO, ALDO PASTORE, FILIPPO RICUPA, VINCENZO RIVERSO, PAOLA RIZZUTO, MATTEO ROMANO, RICHARD SABINO, CHARLES SALERNO, ALFREDO SPAVENTO, GIUSEPPE TROIA, FRANK ZIGON, LORENZO ZORZA,

O R D E R

##89-1447, -1489, -1526, -1547, -1589, -1598

Defendants,

MICHELE BERNARDO, VINCENZO RIVERSO, ALFREDO SPAVENTO,
Defendants-Appellants,

VINCENZO MICELI, MICHELE MODICA,
Defendants-Appellants, Cross-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in part and remanded in part.

Michele Bernardo, Vincenzo Miceli, Michele Modica, Vincenzo Riverso, and Alfredo Spavento appeal from their convictions on narcotics conspiracy and numerous substantive drug charges. The government appeals from the sentences imposed on Modica and Miceli, arguing

that the district court failed to take account of all of their relevant conduct. Appellants raise a host of claims on appeal, all of which are wholly meritless.

We first consider two claims joined by all of the appellants and then address their remaining individual claims. We then address the government's cross-appeal.

A. Insufficient Evidence of a Single Conspiracy

Appellants argue that, as a matter of law, the evidence proved multiple conspiracies. Appellants' principal contention is that there was no connection between the Italian heroin-for-cocaine swap -- in which Spavento, Riverso and Bernardo were involved -- and the purely domestic heroin and cocaine distribution activities — in which all appellants were involved.

Appellants do not challenge Judge Sprizzo's instructions regarding the multiple conspiracies issue, and we must therefore

uphold defendants' convictions if"'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" United States v. Casamento, 887 P.2d 1141, 1156 (2d Cir. 1989) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)), cert. denied, 110 S. Ct. 1138 (1990). Moreover, we have held that, even when a conspiracy has several spheres of operation, a single conspiracy may still be found where the spheres assist and cooperate with each other, United States v. Taylor, 562 F.2d 1345, 1351 (2d Cir.), cert. denied, 432 U.S. 909 (1977), and each member participated in the conspiracy "with a consciousness of its general nature and extent." United States v. Alessi, 638 F.2d 466, 473 (2d Cir. 1980).

Viewed in the light most favorable to the government, the evidence presented at trial established that Spavento, with the assistance of Riverso, managed a network of narcotics suppliers and distributors. Although there was

no direct link between Modica's and Miceli's domestic drug trafficking activities and the Italian heroin-for-cocaine scheme, both were essential as sources of supply for the Spavento network, as demonstrated by Spavento's and Riverso's involvement in both operations. Where a drug distribution enterprise depends on two or more sources of supply, we have found no bar to including both in the same conspiracy. Casamento, 887 F.2d at 1158; United States v. Miley, 513 F.2d 1191, 1207 (2d Cir.), cert. denied, 423 U.S. 842 (1975). B. Prejudicial Joinder and Denial of Severance Motions.

Bernardo, Miceli and Modica contend that they were prejudiced by being tried jointly with their codefendants. Appellants were properly joined under Fed. R. Crim. P. 8(b) because they were all charged in the conspiracy count with participating in a common plan. See United States v. Bernstein, 533 F.2d 775, 789 (2d Cir.), cert. denied, 429 U.S. 998 (1976). Appellants therefore must challenge the denial

of their Rule 14 severance motions. As we have repeatedly observed, they bear the "extremely difficult burden," Casamento, 887 F.2d at 1149, under that Rule of showing that the denial of their severance motions caused "substantial prejudice." Id. at 1150. They have not carried that burden.

No appellant offers a specific example of prejudicial spillover other than arguments concerning the sufficiency of evidence as to whether there was a single criminal conspiracy in which each appellant participated.

Miceli and Modica argue that their defenses were anatagonistic to Spavento's defense. However, Spavento's defense did not prejudice them but rather falsely exculpated them. In any event, they have not shown the mutual exclusivity of defenses that is necessary to support a severance motion. United States v. Serooosh. 919 F.2d 835, 837 (2d Cir. 1990).

Bernardo's objections to the length and

complexity of the trial are similarly baseless. Although Judge Sprizzo's comments and the government's own brief indicate that the evidence was inartfully presented at trial, there is no indication from the jury's verdicts or any other part of the record that the trial was so unwieldy as to deny appellants their right to a fair trial. The trial was thus shorter and involved fewer defendants than other trials in which we have found no prejudice in a joint trial. See, e.g., Casamento, 887 F.2d 1141. Accordingly, the district court did not abuse its discretion by denying the severance motions and permitting the joint trial.

C. Michele Bernardo

1. Right to Testify at Trial

Bernardo contends that the trial court should have allowed him to testify about the government's alleged breach of his cooperation agreement and the withdrawal of his guilty plea. He also argues that the court prevented

him from testifying about threats the government allegedly made against Bernardo and his wife and about his relationship with his codefendants.

In fact, the court permitted Bernardo to testify about the alleged threats and about his relationship with his codefendants. However, Judge Sprizzo execluded testimony about the plea agreement as irrelevant to Bernardo's entrapment defense or any other material issue and a prejudicial to Bernardo's codefendants. At the same time, Judga Sprizzo invited Bernardo's attorney to move for severance if he believed that Bernardo was prejudiced by the ruling. Bernardo's attorney declined to make such a motion. In view of the decision to continue with a joint trial, Bernardo's claim of prejudice is questionable. Moreover, if Bernardo had offered the proposed testimony, the government would have been able to introduce Bernardo's sworn admissions made while he was cooperating, the effect of which

would have been very prejudicial.

2. Similar Acts Evidence on Entrapment Defense

Bernardo also argues that the trial court should have allowed him to introduce a videotaped conversation between two agents in which one agent said that if the agents conducted the operation well they "could go someplace." Judge Sprizzo correctly ruled that the videotaped conversation involved a discussion of going "someplace" within the narcotics conspiracy, rather than obtaining personal promotions, and that the discussion of taking a suspect into international waters in order to effect an arrest had no probative value concerning Bernardo's entrapment defense.

3. Failure to Submit a Prosecutorial Misconduct Defense to the Jury

Bernardo argues that the district court should have submitted his prosecutorial misconduct defense to the jury. However, this defense is "not for the jury to consider, but

must be decided by the trial court." United States v. Nunez-Rios 622 F.2d 1093, 1098 (2d Cir. 1980). Bernardo's alternative argument that the district court did not make proper findings concerning the alleged prosecutorial misconduct was waived by Bernardo's failure to present the issue before trial. Id. at 1098-99. In any event, the undercover operation did not involve any unusual or extraordinary measures and certainly was not sufficient to amount to a denial of Bernardo's right to due process. See Hampton v. United States, 425 U.S. 484, 495 n.7 (1976).

4. Ex Post Facto Application of Guidelines

Bernardo contends that because there was no narcotics activity involving import or export after the effective date of the Sentencing Guidelines, application of the Guidelines to his offense violates the constitutional prohibition of ex post facto laws. However, there were domestic heroin

sales, one of the objects of the conspiracy, by members of the conspiracy in December 1987 and March 1988. Acts in furtherance of the conspiracy thug continued after the effective date of the Guidelines, and Bernardo was properly sentenced under the Guidelines. See United States v. Story, 891 F.2d 988 (2d Cir. 1989).

D. Vincenzo Miceli and Michele Modica

1. Insufficient Evidence That Miceli and Modica Were Knowing Participants

Miceli and Modica argue, in essence, that they were not members of the single conspiracy charged in the indictment. However, each had sufficient connection to, and knowledge of, the Spavento narcotics distribution network to support the jury's verdict.

Viewed in the light most favorable to the government, Miceli and Modica were involved in numerous narcotics transactions with Spavento and with Riverso, acting as Spavento's agent. The scale of these transactions and their

frequency were sufficient to put both Modica and Miceli on notice that they were involved with a substantial drug trafficking operation, knowledge sufficient to connect them to the charged conspiracy. See Casamento, 887 F.2d at 1156 ("[O]nce a conspiracy is shown to exist, the evidence sufficient to link another defendant to it need not be overwhelming"); United States v. Martino, 759 F.2d 998, 1003 (2 Cir. 1985) (each member need not know all details concerning an unlawful agreement); United States v.Papadakis, 510 F.2d 287, 297 (2d Cir.) (connection with one objective of conspiracy is sufficient to connect defendant with entire conspiracy), cert. denied, 421 U.S. 950 (1975).

2. Failure to Minimize Electronic Surveillance

Miceli and Modica argue that a twelve-minute segment of a wiretap tape containing noncriminal discussion demonstrates that the agents failed to properly minimize their

electronic surveillance. However, by failing to offer specific evidence in support of their minimization argument during pretrial proceedings, appellants waived this argument. See United States v. Sisca, 503 F.2d 1337 (2d Cir.), cert. denied, 419 U.S. 1008 (1974). In any event, there is substantial evidence that the agents took reasonable steps to minimize the intrusiveness of the wiretap on Modica's car, including the use of an interpreter and spot-checking. The twelve-minute noncriminal section of GX 1262 was by itself not so extensive as to show inadequate minimization efforts.

3. Failure to Prove Chain of Custody for Miceli's Wallet

Miceli contends that the government failed to prove the chain of custody for the contents of his wallet which were admitted into evidence against him at trial. However, "the government need only prove a rational basis for concluding ;hat an exhibit is what it is claimed to be."

United States v. Hon, 904 F.2d 803, 809 (2d Cir. 1990). A district court's ruling that an exhibit has been properly authenticated is reviewed under an abuse of discretion standard. Id. at 810. Because Miceli offers no factual basis to overturn the district court's decision, there was no error.

4. Constructive Amendment of Indictment

Miceli argues that the government's evidence was insufficient to prove the charged conspiracy but instead proved a series of unrelated smaller conspiracies, resulting in a variance between the offense of indictment and the offense of conviction. However, we have already concluded that the evidence of a single conspiracy and of Micheli's participation in that conspiracy was sufficient.

Modica contends that a shirt in the focus of the government's case from the domestic drug distribution operation to the Italian heroin-for-cocaine operation violated Modica's right to be indicted by a grand jury. However, the

shift in emphasis did not "modify essential elements of the offense charged," United States v. Mollica, 849 F.2d 723, 729 (2d Cir. 1988), because the original indictment charged both the domestic and international operations as objectives of the conspiracy and the proof at trial showed the existence and interrelatedness of both branches.

5. Impact of Media Coverage on the Jury

Miceli argues that the district court should have granted his motion for a mistrial; on the grounds of prejudicial publicity. The court conducted extensive voir dire after the jurors' exposure to newspaper accounts of the dismissal of charges against seven defendants became known. There is no evidence of an abuse of discretion in permitting the jurors who were exposed to remain. United States v. Rivalta, 892 F.2d 223, 228 (2d Cir. 1989).

E. Vincenzo Riverso

1. Insufficient Evidence That Rivergo Was a Knowing Farticipant

Riverso contends that the government's evidence was legally insufficient to prove that he was a knowing participated in the charged conspiracy. However, there was overwhelming evidence that Riverso participated in gales to Agent Caruso and in the use of Jerry Mark as a courier to smuggle cocaine into Italy and actes as Spavento's representative in these transactions. There was thus more than sufficient evidence to connect Riverso to Spavento's activities and thus to the charged conspiracy. See Papadakis, 510 F.2d at 297.

2. Ineffective Assistance of Counsel

Riverso also argues that, by conceding during summation that Riverso was the "Enzo" mentioned in a tape-recorded conversation between Spavento and Rafael Fiumara concerning a planned heroin sale, trial counsel deprived Riverso of the effective assistance of counsel. However, the elaborate seauence of intercepted conversations, undercover meetings and physical surveillances unequivocally established that

Fiumara's reference in the taped conversation was to Riverso and no one else. The concession was thus a reasonable strategic decision because a denial would very likely have weakened Riverso's argument. In any event, the concession could not have prejudiced Riverso in light of the overwhelming evidence of his participation in the relevant narcotics negotiations and transactions.

3. Government's Alleged Use of False Testimony and Withholding of Exculpatory Evidence

Riverso contends that the government offered false testimony and withheld exculpatory evidence. Riverso claims that the testimony of accomplice witness Jerry Mark, placing Riverso at a meeting at the Rome train station, was necessarily false because an affidavit filed by FBI Special Agent Wasky did not state that Italian law enforcement officers observed Riverso at the train station. However, a photograph taken by Italian officers in the

vicinity of the Rome train station and admitted into evidence shows a meeting among Mark, Fiumara and Riverso, and therefore corroborates Mark's testimony. Finally, although Rivergo states that there were potentially exculpatory Italian police reports, he has offered no evidence in support of that naked allegation.

F. Alfredo Spavento

1. Erroneously Found to be an Organizer

Spavento argues that the district court improperly enhanced his sentence upon an erroneous finding that he was an organizer in the conspiracy. Howevser, the evidence was overwhelming to this effect.

Section 3B1.1(c) of the Guidelines provides that a defandant's offense level should be increased by two levels "[i]f the defendant was an organizer, leader, manager, or supervisor in any criminal activity." The district court's finding that Spavento was an "organizer," and "core conspirator" who played a "central role,"was amply supported by the

evidence that Spavento supervised Riverso, Bernardo and Fiumara and that he arranged numerous narcotics transactions.

2. Denial of Continuance Without Evidentiary Hearing

Spavento also argues that the district court abused its discretion by denying his motion for a continuance without holding an evidentiary hearing. In fact, Judge Sprizzo adjourned the trial for three weeks after Spavento complained of chest pains during his direct examination. Medical examination disclosed no ailments. Judge Sprizzo speculated, with considerable plausibility, that Spavento was feigning illness to avoid the upcoming cross-examination. Judge Sprizzo also instructed the jury that Spavento was thereafter testifying in some physical discomfort. In the circumstances, there was no abuse of discretion in denying the motion for an additional continuance. See Bernstein v. Travia, 495 P.2d 1180, 1182 (2d Cir. 1974);

United States v. Guzman, 754 F.2d 482, 486 (1985), cert. denied, 474 U.S. 1054 (1986). Finally, Spavento did not request an evidentiary hearing or make any factual argument that required additional factfinding.

G. The Government's Cross-Appeal of Modica's and Miceli's Sentences

The district court ruled that only narcotics transactions shown to be directly connected to the charged conspiracy were "relevant conduct" for the purposes of computing the base offense Level. After that ruling, we held that "[q]uantities of narcotics neither charged in the indictment nor physically seized are 'relevant conduct' . . . if they were part of tho same course of conduct as the counts leading to conviction."United States v. Schaper, 903 F. 2d 891, 898 (2d Cir. 1990) . See also United States v. Colon, 905 F.2d 580, 586-88 (2d Cir. 1990); Bedova, 878 F.2d 73, 75 (2d Cir. 1989).

Modica's and Miceli's narcotics

transactions that are not connected to tho charged conspiracy could nonetheless have been part of the same "course of conduct" that led to their participation in the conspiracy. We thus remand for the district court to reconsider the sentences imposed on Miceli and Modica. On remand, they should be sentenced based on any and all narcotics transactions the government can prove by a preponderance of the evidence to have been part of the same "pattern of criminal behavior" as their participation in the charged conspiracy. See United States v. Santiago, 906 F.2d 867, 872 (2d Cir. 1990).

The government also contends that on remand it should be able to argue that Modica and Miceli should be sentenced on the basis of all of the narcotics chargeable to the conspiracy. See United States v. Cardenas, 917 F.2d 683, 687 (2d Cir. 1990). However, the government failed to raise this argument as an objection to the presentence report, and the district court therefore ruled that the

government had waived the argument. The government contends that, since its position during the sentencing hearing was that Modica's and Miceli's own heroin dealings placed them in the maximum ten kilogram or greater category in the applicable drug weight table, any proposal to include the heroin dealings of their coconspirators would have been superfluous. The government argues that once the district court rejected the government's and the Probation Department's initial calculations, the government should not have been barred from urging an alternative ground on which its sentencing recommendation could be sustained.

The district court's waiver ruling was based on Southern District of New York Local Rule 10(b), which provides that objections to a presentence report must be made at least ten days before sentencing. In light of the local rule, we conclude that the district court was justified in ruling that the government had waived its argument.

Affirmed in part and remanded in part.

Hon. Ellsworth A. Van Graafeiland, U.S.C.J.

Hon. Ralph K. Winter, U.S.C.J.

Hon. John M. Walker, Jr., U.S.C.J.

N.B.: THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA
Appellee-Cross-Appellant,
v.
ADAMITA Et Al.,
Defendants,
VINCENZO MICELI, MICHAEL MODICA,
Defendant-Appellant-Cross-Appellees,
MICHAEL BERNARDO, ALFREDO SPAVENTO,
VINCENZO RIVERSO,
Defendants-Appellants.

DOCKET NUMBER
89-1447 (L),
89-1489, 89-1526
89-1547, 89-1589
89-1598

A petition for rehearing having been filed herein by Defendant-Appellant, Vincenzo Riverso

Upon consideration by the panel that heard the appeal, it is

Ordered that the said petition for rehearing is DENIED.

FILED: JUL 16, 1991

/s/
ELAINE B. GOLDSMITH
Clerk

APPENDIX C

DEFENDANTS' SALES OF HEROIN AND COCAINE*
(sources: indictment, gov't's brief on appeal)

1987	seller	grams (price)	source/broker
Jan	Bernardo	250 (40,000)	unknown
Feb	Bernardo	250 (40,000)	unknown
Mar	Bernardo	250 (40,000)	unknown
Apr	Bernardo	250 (27,000)	Fiumara
Apr	Rizzuto	*500 (15,000)	unknown
May	Rizzuto	25 (sample)	unknown
May	Adamita	1 (sample)	unknown
May	Adamita	*500 (15,000)	unknown
May	Bernardo	114 (10,000)	Fiumara
Jun	Adamita	28 (9,500)	unknown
Jun	Rizzuto	28 (9,000)	unknown
Jul	Adamita	28 (10,000)	unknown
Aug	Adamita	280 (90,000)	unknown
Aug	Modica Miceli	1000 (210,000)	Spavento
Nov	Adamita	28 (10,000)	unknown
Dec	Adamita	90 (35,000)	Modica Miceli Spavento
Dec	Modica	500 (110,000)	Spavento
Jan 88	Rizzuto	26 (6,500)	unknown
Mar 88	Modica	1000 (195,000)	Kakar
Mar 88	Adamita	500 (arrest)	Modica Miceli

Supreme Court, U.S.
FILED
DEC 18 1991
OFFICE OF THE CLERK

No. 91-657

In the Supreme Court of the United States

OCTOBER TERM, 1991

VINCENZO RIVERSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was sufficient to sustain petitioner's convictions.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is not reported, but the judgment is noted at 932 F.2d 957 (Table) *sub nom. United States* v. *Adamita.*

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1991. A petition for rehearing was denied on July 16, 1991 (Pet. App. 24a). The petition for a writ of certiorari was filed on October 18, 1991, and thus is out of time under this Court's Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to import heroin into the United States and to export cocaine from the United States, conspiracy to distribute heroin, cocaine, and marijuana, and conspiracy to possess heroin, cocaine, and marijuana with intent to distribute, all in violation of 21 U.S.C. 846. He was sentenced to 151 months' imprisonment, to be followed by four years' supervised release. The court of appeals affirmed. Pet. App. 1a-23a.

1. This case involved an international narcotics trafficking network headed by co-defendant Alfredo Spavento, which operated from 1985 until the participants were arrested in March 1988. The conspiracy focused on the distribution of heroin to wholesale customers. The conspirators acquired the heroin both in this country and in Italy, where they swapped cocaine that they smuggled to Europe for the heroin. They also sold cocaine to wholesale customers and negotiated to purchase a multimillion-dollar quantity of marijuana to distribute in this country. As the court of appeals concluded, the evidence that was related to two of the conspiracy's operations established that petitioner provided substantial assistance to at least two of Spavento's operations. Pet. App. 4a-5a.

a. In August 1987 Jerry Mark, acting at the behest of conspirator Rafael Fiumara, smuggled a package of cocaine into Switzerland, and then to Rome, where he delivered the package to petitioner. Tr. 768-781. In September of the same year, petitioner and co-conspirator Angelo Palumbo met with Mark, who was seeking to collect the money Fiumara owed him as compensation for smuggling cocaine to

Europe. Tr. 782-786. At the meeting, petitioner gave Mark $500 and arranged for Mark to contact him if he was unable to reach Fiumara. Tr. 784-785. Petitioner explained that more money would follow, but that Mark should be patient because there were problems with "the business" and because "things [we]ren't working well." Tr. 785. Petitioner met with Mark on several other occasions later in 1987, at which time petitioner paid Mark more of the money that was owed to him. Tr. 786-792. Finally, petitioner and Fiumara contacted Mark in March 1988, at which time petitioner gave him $1000 to make another smuggling trip to Europe. Tr. 794-798; see Gov't C.A. Br. 16-18.[1]

b. Because the cocaine-heroin swaps did not bring the organization enough heroin to satisfy its customers, Spavento and his associates looked to other persons as sources for heroin. This aspect of the scheme was discovered when a Spavento associate brought undercover FBI Agent Anthony Caruso to Spavento's store in search of heroin. After an aborted sale in June 1987, Spavento introduced Caruso on July 30, 1987, to petitioner and said that petitioner would arrange a second attempted heroin delivery. Tr. 4839-4840. The following day Caruso met with Spavento, petitioner, and co-conspirator Mariano Mazzarino. Tr. 4840-4843. Petitioner and Mazzarino got into Caruso's car with him and drove off to complete the transaction. Tr. 4843. Caruso suggested that he test the heroin and then return to Spavento's store, where his girlfriend had the money. Petitioner and Mazzarino responded that Spavento had not instructed them to complete the transaction in that fashion, and

[1] The trip did not occur because petitioner and Mark were arrested later that week. Tr. at 798.

that they would have to consult with Spavento. Tr. 4843-4844. Petitioner and Mazzarino then returned to Spavento's store, where petitioner and Spavento discussed the logistics with Caruso. Caruso then agreed to pick up his girlfriend and go to Queens to buy the heroin. Tr. 4844-4845. Caruso and undercover FBI Agent Darlene Marley followed petitioner and Mazzarino to a street corner in Queens. Tr. 4849-4851. There, petitioner explained that, because he was there to handle the deal, "[i]t'd [*sic*] like ah [Spavento]'s here. That's it. That's why I'm here. * * * I been with him for 20 years." GX 1110B, at 12-13. The transaction ultimately fell through because the conspirators feared the presence of police surveillance. Tr. 4852-4853; see Gov't C.A. Br. 20-21.

2. On appeal, petitioner argued that there was insufficient evidence to show that he was a knowing participant in the charged conspiracy. The court of appeals rejected that argument, finding that "there was overwhelming evidence that [petitioner] participated in sales to Agent Caruso and in the use of Jerry Mark as a courier to smuggle cocaine into Italy," and that petitioner acted "as Spavento's representative in these transactions." Pet. App. 16a. In the court's view, that represented "more than sufficient evidence to connect [petitioner] to Spavento's activities and thus to the charged conspiracy." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 10-13) that this Court should exercise its supervisory power to reverse the judgment below because, according to petitioner, the court of appeals' decision "rests on conclusions that are not supported by the evidence." Pet. 10. As such, the petition raises a claim not suited for review in this Court. See, *e.g.*, *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317 n.5 (1985) (stating that "this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts").

In any event, the decision below is manifestly correct. As this Court has made clear, a conviction should not be overturned for insufficiency of the evidence if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). In light of this standard, it is clear that the court of appeals correctly concluded that "the evidence presented at trial established that Spavento, with the assistance of [petitioner], managed a network of narcotics suppliers and distributors." Pet. App. 4a. Although petitioner contended in the court of appeals that there were two separate conspiracies (one to distribute drugs in this country and one to sell cocaine for heroin in Italy), see *id.* at 3a-4a, the court of appeals correctly reasoned that both operations were part of the same conspiracy. As the court explained, both operations served as sources of supply for a single network operated by Spavento; the relationship between the operations was demonstrated by, among other things, petitioner's involvement in both. *Id.* at 4a-5a. As the evidence summarized above demonstrates, the govern-

ment's evidence clearly showed petitioner's involvement in both portions of Spavento's network.

Petitioner's argument in this Court seems to be that, because there were several sales to undercover agents in which petitioner did not participate, his activities were not part of the charged "Spavento network." But that argument ignores the fact that in the aborted July 30-31, 1987, transaction with Agent Caruso, Spavento specifically introduced petitioner to Caruso and said that petitioner would make the arrangements for the transaction. See Tr. 4839-4840. Moreover, petitioner himself said to Agent Caruso that he had been "with" Spavento for some 20 years, and that his being at the sale was the equivalent of having Spavento himself present. GX 1110B, at 12-13.[2]

In addition, as the court below aptly observed, petitioner received cocaine from Jerry Mark in Rome, later paid Mark for his smuggling efforts, and enlisted Mark's participation in another smuggling job for late March 1988 that failed to go through only because the defendants were arrested. Pet. App. 16a; Tr. 768-798. That transaction clearly demonstrates that petitioner also participated in the cocaine-for-heroin swaps. Petitioner argues (Pet. 11-12) that his participation in the swaps did not show his participation in the conspiracy, because there is no showing that the swaps ever produced any heroin for the operation. But petitioner's own statements to Mark demonstrate the connection of the cocaine-heroin swaps

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[2] Similarly, when Agent Caruso indicated he wished to conduct the transaction in a way other than the way Spavento had directed, petitioner objected and refused to proceed, explicitly agreeing with Caruso's conclusion that petitioner must be taking orders from Spavento. See GX 1110B, at 5.

to "the business"; as mentioned above, petitioner explained to Mark that he was having difficulty paying Mark because there were problems with "the business" and because "things [we]ren't working well." Tr. 785. Taken in context, the jury reasonably could conclude that the "business" was Spavento's domestic drug trafficking network; the evidence related to the transaction with Caruso overwhelmingly established the participation of Spavento and petitioner in that aspect of the business.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 312324 45202

(3)

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government does not attempt to demonstrate that the record supports any of the court of appeals' evidentiary conclusions we challenge. Summary reversal, therefore, is warranted.

1. The government's argument that the court correctly concluded that the proof showed the single conspiracy the indictment alleged (Br. in Opp. 5-6), is flawed. First, the government's argument, like the court's reasoning it repeats (Pet. App. 4a-5a), is

entirely circular. Its argument (Br. in Opp. 5) reduces to this: the conclusion that there was a single conspiracy, the Spavento network, is correct because there were two conspiracies that supplied the single conspiracy, the Spavento network. Moreover, contrary to the government's (and the court's) reasoning, the proposition that Riverso participated in both supply conspiracies (a proposition the government does not establish on the basis of the evidence in any event, see the next paragraph) does not justify the conclusion that the single Spavento network existed. The customers of a common supplier are not, for that reason, a single enterprise.

Second, the government relies on the evidentiary conclusions we claim are unsupported without attempting to show that the record supports them or acknowledging our claims. The court concluded that Riverso was involved in Modica's and Miceli's supply operation and in the swap scheme (Pet. App. 5a),

and we have challenged both conclusions on the ground that there is no evidence to support them. Pet. 11-12. The government offers no record support for either conclusion. But it argues that the court correctly concluded that there was a single conspiracy because, it says (Br. in Opp. 5), "[a]s the court explained, both operations served as sources of supply for a single network operated by Spavento; [and Riverso was] involve[d] in both. Id. at 4a-5a." (The court, at the cited pages, refers to Modica's and Miceli's supply operation and the swap scheme.)

Third, the government supports its assertion that the swap scheme actually operated by attributing a concession to Riverso he never made. It says Riverso "contended [thus conceding] in the court of appeals that there were two separate conspiracies (one to distribute drugs in this country and one to sell cocaine for heroin in Italy) ...". Br. in Opp. 5. Riverso, however, did not concede

that the swap scheme operated, but argued, as he does here, that it did not. In the court below (C.A. Br. 21), Riverso, acknowleding that "[t]here is evidence that some defendants spoke about the prospect of smuggling cocaine to Europe and returning with heroin," argued that "there is no evidence that any of these discussions resulted in action toward that end." (The discussions are summarized at page 7 of the petition.)

Finally, the government does not respond to our claim (Pet. 10-11) that it is irrational to conclude that Spavento with Riverso's help managed the single conspiracy the indictment alleged, where there is no evidence connecting Spavento to the vast majority of the alleged conspirators' sales and no evidence connecting Riverso to any of them.

2. The court's determination that Riverso participated in the charged conspiracy, we contend (Pet. 12), cannot be sustained because there is no record support for its

underlying evidentiary conclusions, namely: that Riverso participated in (1) drug sales to Agent Caruso and (2) the use of Jerry Mark as a cocaine smuggler and (3) "acted as Spavento's representative in these transactions," the latter serving, in the court's view, to "connect Riverso to Spavento's activities and thus to the charged conspiracy." Pet. App. 16a.

The government does not defend the court's conclusions that Riverso sold drugs to Agent Caruso and that Riverso acted as Spavento's representative when he dealt with Mark. Instead, it argues, though not expressly, that Riverso's conviction can be sustained on other grounds.

Riverso's participation in the conspiracy, the government argues, is shown by his participation in an attempted drug sale to Agent Caruso (which the court did not mention) and by a "connection" between the swap scheme and the Spavento network (Br. in Opp. 6-7)

(which the government did not advance below). The record, however, contradicts the arguments.

a. The government contends that the July 31, 1987, transaction involving Agent Caruso was a drug sale the conspirators canceled. Br. in Opp. 4, 6. But it also contended before the jury that the transaction was not an attempted sale but an attempted larceny of the agent's cash, as Riverso contended. On rebuttal summation, responding to Spavento's argument that he sold drugs to Agent Caruso only to help a friend, the government asked, rhetorically: "[w]hy on July 31st did Mr. Spavento try to steal $100,000 from Agent Caruso?" Tr. 9731.

That view of the transaction is confirmed by the recorded conversation among Agent Caruso, Mazzerino and Riverso. When Mazzerino told Agent Caruso, "I count [your] money and I look at the stuff [heroin] before you do," Agent Caruso said "you guys speak Italian and

I don't know where I'm at." GX 1110B, at 11. Riverso replied, "... if the money [is] in my hand's, it's like [Spavento] has it or you have it." Ibid. Then, when Agent Caruso said "I'm comfortable with [Spavento], I know him," Riverso said, "I been with [Spavento] for 20 years." Id. at 12-13.

In addition, Agent Caruso's contemporaneous account of the incident and his trial testimony show that he did not believe anyone was going to sell him heroin on July 31st. Two weeks later Agent Caruso told defendant Modica, "I got jacked around the whole week. ... [Spavento] says come back tomorrow, I go back tomorrow the guy didn't show ...". GX 1113B at 18-19. And Agent Caruso testified that he was being "jerked around" on July 31st. Tr. 5460.

Finally, to support its argument that Riverso participated in drug sales the government attributes another concession to Riverso he never made. It says Riverso contends in

this Court that "there were several sales to undercover agents in which [he] did not participate, ..." (Br. in Opp. 6), implying the concession that he participated in some sales. But Riverso claims that he did not participate in any drug sales (see, Pet. 8, 11), a claim confirmed by the government's inability to identify one.

b. The significance of Riverso's transaction with Jerry Mark, according to the court below, was that it connected Riverso to the Spavento network, a conclusion it based on its determination that Riverso was acting as Spavento's representative or agent. Pet. App. 16a. As we mentioned, the government does not defend that determination, but advances, apparently as a substitute, a different argument to demonstrate a different connection. Before turning to the government's argument, we make three brief observations about its evidentiary claims.

The government asserts, in effect, that Riverso knowingly participated in the exportation of cocaine (Br. in Opp. 6) (an offense the indictment does not charge). That, by itself, would not support a finding that Riverso was a member of the conspiracy charged in this case. Nonetheless, it seems useful to represent that there is nothing in the pages of Mark's testimony the government cites (or anywhere else in the record) to show either that Riverso knew what was in the package Mark said he gave him or that Riverso knew that Mark smuggled drugs on his trips to Europe.

In addition, the government asserts that the transaction shows that Riverso participated in the swap scheme. Br. in Opp. 6. But it does not point to anything in the record to show that the package Mark said he gave Riverso was, or was intended to be, swapped for heroin, by definition a showing necessary to support the assertion.

And the government represents, incorrectly, that Riverso concedes that the swap scheme operated and that he participated in it. According to the government, Riverso "argues (Pet. 11-12) that his participation in the swaps did not show his participation in the conspiracy ...". Br. in Opp. 6. But no such argument appears in the petition.

The government argues that there was a connection between the swap scheme and the Spavento network (Br. in Opp. 6-7), although it never demonstrates that there is evidence in the record that proves the existence of either one. The connection is established, the government maintains, by Riverso's statement to Mark "that he [Riverso] was having difficulty paying Mark because there were problems with 'the business' ...". Id. at 7. From this the government argues that since Riverso was involved in the Spavento network it is reasonable to infer that Riverso's ref-

erence to "the business" was a reference to the Spavento network.

The logic of the argument, which is questionable, need not be debated because its essential factual premise is refuted by the record, indeed, by the government itself.

The connection the government argues for depends entirely on the accuracy of its representation that Mark's testimony establishes that Riverso was the one who owed Mark money and was going to pay him. If Riverso was giving Mark money on behalf of another, then Riverso's reference to business problems as the excuse for not paying Mark would have been to that person's business, not to a business in which Riverso was involved.

That, in fact, is precisely the import of Mark's testimony. On direct examination Mark said that "Mr. Riverso gave me $500 that he said came from Mr. Fiumara, and that he said that there would -- Mr. Riverso said that more money will follow, to be patient, that they

have had problems in the business and things weren't working well. ... Mr. Riverso would say, don't worry about getting me [my?] money, Mr. Fiumara would guarantee that I would get the money ...". Tr. 784-785.

Then, on redirect examination, the government eliminated any doubt about who owed Mark the money and who was going to pay Mark and, therefore, who was having business problems. The government asked Mark if he recalled being asked on cross-examination whether Riverso would pay him. Defense counsel objected because, he said, "[h]e was talking about Mr. Fiumara." The government responded, "That is precisely my point." Tr. 1068-1069. It is also Riverso's.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the court of appeals affirming Riverso's conviction should be reversed.

Respectfully submitted.

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January 1992